BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KRISTYN J. NIEDER	)	
Claimant	)	
VS.	)	
	)	Docket No. 248,882
USD 497	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the Award of Administrative Law Judge Robert H. Foerschler of May 15, 2000. Claimant was granted an 11 percent impairment to her right forearm based upon the opinions of P. Brent Koprivica, M.D., and Chris D. Fevurly, M.D. The independent medical examination report of orthopedic surgeon Daniel M. Downs, M.D., was excluded from consideration by the Administrative Law Judge pursuant to K.S.A. 44-519. Oral argument before the Board was held on December 8, 2000.

APPEARANCES

Claimant appeared by her attorney, John G. O'Connor of Kansas City, Kansas. Respondent appeared by its attorney, Kip A. Kubin of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) Did the Administrative Law Judge err in sustaining respondent's motion to exclude the independent medical examination report of Daniel M. Downs, M.D.?

(2) What is the nature and extent of claimant's injury?

(3) If the Board finds the opinion of Dr. Downs should be part of the record, should this matter be remanded to the Administrative Law Judge for his consideration?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds as follows:

Claimant suffered injury on February 12, 1999, when, while ice skating on a school field trip in Kansas City, she fell, breaking her right wrist. Claimant was treated by Dr. Jeff Randall, a local orthopedist in Lawrence, Kansas. Claimant's injury is limited to her right forearm. *See* K.S.A. 44-510d(a)(12).

After several months of treatment, claimant was referred by respondent to Chris D. Fevurly, M.D., for an examination and rating. Dr. Fevurly opined that claimant had suffered a 4 percent impairment to the right upper extremity based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Claimant was then referred to P. Brent Koprivica, M.D., by her attorney. Dr. Koprivica performed an independent medical examination on October 22, 1999. Dr. Koprivica opined that, pursuant to the AMA Guides, Fourth Edition, claimant had suffered a 20 percent impairment to the right upper extremity "at the level of the forearm."

Realizing the conflict in impairment ratings, the Administrative Law Judge referred claimant to orthopedic surgeon Daniel M. Downs, M.D., for an independent medical examination pursuant to K.S.A. 1998 Supp. 44-510e. While there was no objection to this examination at the time of the referral, respondent did timely object to the report at the regular hearing, contending that, pursuant to K.S.A. 44-519, Dr. Downs' opinion could not be considered absent his deposition being taken. The Administrative Law Judge, citing the Appeals Board's decision in Lowe v. The Jones Store Company, WCAB Docket No. 239,741 (April, 2000), agreed and excluded Dr. Downs' court ordered independent medical examination opinion. The Administrative Law Judge went on to consider the opinions of Dr. Koprivica and Dr. Fevurly and, weighing both equally, awarded claimant an 11 percent impairment to the right forearm.

At the regular hearing, the Administrative Law Judge, during the discussion about respondent's objection to the inclusion of Dr. Downs' report, made the following statement: "It may be considered. It's just discretionary, so I don't know. I don't even know what he said. I don't remember what he said now, so it will be part of the record because it's here."

Had the Administrative Law Judge affirmed respondent's objection at that time, claimant could have taken Dr. Downs' deposition. By the Administrative Law Judge inferring one decision at regular hearing and then deciding the opposite at the time of the award, claimant was clearly prejudiced.

The authority of the Administrative Law Judge to refer a claimant for an independent medical examination under K.S.A. 1997 Supp. 44-510e or under K.S.A. 44-516 was discussed at length by the Board in Lowe, *supra*.

K.S.A. 44-510e allows for a referral by the administrative law judge of a claimant to a health care provider who is instructed to issue an opinion regarding the employee's functional impairment "which shall be considered by the administrative law judge in making the final determination."

K.S.A. 44-510e, however, deals with compensation for permanent partial general disabilities. In this instance, claimant's injury is a scheduled injury under K.S.A. 44-510d. While the injury in Lowe was also a scheduled injury, it was noted by the Board that, at the time the independent medical examination was ordered in Lowe, there was no stipulation as to a scheduled injury. The Board, however, found no distinction between an independent medical examination report under K.S.A. 44-516 for a K.S.A. 44-510d scheduled injury and for one ordered under K.S.A. 44-510e. The Board believes that the legislature, in amending K.S.A. 44-510e in 1993 to allow the consideration of an independent medical examination report, did not intend to limit those reports to only general body disabilities.

The Administrative Law Judge, here, realizing that his order specified K.S.A. 44-510e rather than K.S.A. 44-516, found that omission to be significant and excluded the opinion of Dr. Downs. The Appeals Board finds the error by the Administrative Law Judge in specifying K.S.A. 44-510e rather than K.S.A. 44-516 to be harmless. The Administrative Law Judge has the power to appoint an independent medical examining physician under both K.S.A. 44-510e and K.S.A. 44-516. Additionally, the legislature recently amended K.S.A. 44-516 to read "[t]he report of any such health care provider shall be considered by the administrative law judge in making the final determination."

This shows a clear intent on the part of the legislature to create an exception to the limitations of K.S.A. 44-519 any time an administrative law judge appoints an independent examining physician under either K.S.A. 44-510e or K.S.A. 44-516. The Appeals Board will not thwart this legislative intent merely because an Administrative Law Judge mistakenly cited the wrong statute in his order.

The Administrative Law Judge appointed an independent examining physician to consider claimant's injuries and provide an opinion regarding what, if any, impairment claimant may have suffered as a result of those injuries. Dr. Downs' opinion, being that of

a court ordered independent medical examiner, should be unbiased and objective and should not be excluded by a judge's error. The Appeals Board, therefore, affirms its earlier decision in Lowe, finding that there is no distinction between an independent medical examination ordered under K.S.A. 44-516 for a scheduled injury and one ordered under K.S.A. 44 510e for a general body impairment.

The Court of Appeals has ruled that K.S.A. 44-501e creates "a narrow exception to the general rules of K.S.A. 44-519". Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997). The legislature then chose to include that narrow exception in both K.S.A. 44-510e and K.S.A. 44-516 to resolve conflicts between medical opinions in the final determination of a claimant's impairment. The Appeals Board finds the Administrative Law Judge should have denied respondent's motion to exclude the independent medical examination report of Dr. Downs.

The Board, the de novo trier of fact, in considering the party's request for a remand to the Administrative Law Judge, finds that judicial economy does not favor such a remand. Therefore, the Board will address the issue of claimant's disability.

In considering the nature and extent of claimant's injury, the Appeals Board finds the opinion of Dr. Downs to be the most credible. Neither Dr. Koprivica nor Dr. Fevurly were the treating physicians in this matter, but instead were hired experts of the opposing parties. Dr. Downs' opinion being that of an independent medical examiner is more objective and unbiased. Additionally, the Board finds it significant that Dr. Downs not only reviewed the reports and tests of Dr. Koprivica and Dr. Fevurly, he also went the additional step of ordering and reviewing new x-rays, which included motion films with radial and ulnar deviation, flexion, extension with the fingers extended and fists clenched. Those x-rays were helpful in allowing Dr. Downs to evaluate claimant's additional impairments which included joint space narrowing at the radial carpal joint, diastasis at the scapholunate joint and an incongruency in the angle of the scapholunate joint. Dr. Downs diagnosed not only a distal radius fracture, but also an intercarpal bone ligamentous injury which he opined explained the persistent limitation and stiffness in claimant's wrist. Dr. Downs assessed claimant an 18 percent impairment to the right upper extremity, which the Appeals Board finds is limited to the right forearm at the wrist level. The Award of the Administrative Law Judge is modified, and claimant is awarded an 18 percent upper extremity impairment at the right wrist pursuant to the above findings.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 15, 2000, should be, and is hereby, modified and an award is granted against respondent and in favor of the

claimant for an 18 percent loss of use of the right upper extremity at the forearm based upon the opinion of Dr. Downs.

Claimant is entitled to 36 weeks of permanent partial disability compensation at the maximum rate of $366 per week for a total award of $13,176 for an 18 percent loss of use of the right forearm. At the time of this award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the opinions contained herein.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully dissent from the majority decision that the report of Dr. Downs may be considered in this case. The majority finds that respondent, pursuant to K.S.A. 44-519, made timely objection to Dr. Downs' report. The Administrative Law Judge had ordered the independent medical examination by Dr. Downs pursuant to K.S.A. 1998 Supp. 44-510e(a). The majority then determines that ordering the examination pursuant to the wrong statute was harmless error because, under either K.S.A. 1998 Supp. 44-510e(a) or K.S.A. 44-516, the ordered report could be considered without the supporting testimony of the health care provider.

As the majority states, K.S.A. 1998 Supp. 44-510e provides for compensation for permanent partial general disability and this is a claim for a scheduled injury pursuant to K.S.A. 1998 Supp. 44-510d. The majority further notes that the legislature, effective July 1,

2000, amended K.S.A. 44-516 to provide such ordered report be considered by the administrative law judge in making the final determination.

I must dissent because this case is governed by the law as it existed prior to the amendment of K.S.A. 44-516. In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties. Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 962 (1997).

K.S.A. 44-519 provides that no report of any examination by a health care provider shall be competent evidence unless supported by the testimony of such health care provider. In Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997), the Supreme Court emphasized that K.S.A. 44-519 is not a mere technical rule of evidence but rather a legislative mandate and that exceptions to the statute should be enacted by the legislature and not the courts.

The specific language in K.S.A. 1998 Supp. 44-510e(a) that allows the independent medical examination report to be considered without the supporting testimony of the examiner is a narrow exception to the provisions of K.S.A. 44-519. Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997). That same specific language creating the narrow exception to the provisions of K.S.A. 44-519 was absent from K.S.A. 44-516 until July 1, 2000. The majority prematurely applied that language and the rationale of the legislature in amending the statute in order to consider the medical report in this case as well as in the prior cited board decision.

When the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment. Hughes v. Inland Container Corp., 247 Kan. 407, 414, 799 p.2d 1011 (1990). Prior to the amendment of K.S.A. 44-516, either the claimant or the respondent could object, pursuant to K.S.A. 44-519, to the introduction of a health care provider's report not supported by the testimony of such health care provider. Here, as in Osborn, retroactive application of the amendment to K.S.A. 44-516 would affect that vested right of defense.

I would affirm the Administrative Law Judge and not consider the report of Dr. Downs.

BOARD MEMBER

c: John G. O'Connor, Kansas City, KS
Kip A. Kubin, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director